Judgment

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

FIRST APPEAL NO.12 OF 2010

United India Insurance Company Ltd.,
Through its Branch Manager,
Yavatmal, taluka and district Yavatmal. ….. Appellant.

:: V E R S U S ::

1. Toufic Ahemed s/o Majidkhan,
Aged about 39 years, occupation nil,
R/o Hingoli, taluka and district Hingoli.

2. Suhas s/o Rajabhau Gandhewar,
Aged major, occupation business,
R/o Hingoli, taluka and district Hingoli. ….. Respondents.

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Shri B.Lahiri, Counsel for the Appellant.
Shri K.S.Narwade, Counsel for Respondent No.1.

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CORAM : URMILA JOSHI-PHALKE, J.
CLOSED ON : 02/02/2023
PRONOUNCED ON : 21/03/2023

JUDGMENT

1. The present appeal is preferred by the United India Insurance Company Limited under Section 173 of the Motor Vehicles Act, 1988 (the said Act) against judgment and award dated 5.8.2009 passed by learned Member, Motor Accident Claims Tribunal at Darwha (learned Member of the Tribunal) in MACP No.113/2006. The parties are hereinafter referred as per their original nomenclature in the claim petition.

.....2/-

2. Brief facts which are necessary to decide the appeal are as follows:

Respondent No.1/claimant (the applicant) Toufic Ahemed, who is resident of Hingoli, was engaged by respondent No.2 (non-applicant No.1) Suhas Rajabhau Gandhewar to work as a driver on 11.5.1991 to drive non-applicant No.1's Maruti Van bearing No.MP-09-B-6838 (the offending vehicle) as his regular driver was on leave. The brother of non-applicant No.1 namely Sushil Rajabhau Gandhewar (the deceased) was accompanied with the applicant. The applicant, along with the deceased, had been to Nagpur on fateful day i.e. 11.5.1991 and after finishing work, they proceeded towards Hingoli. While they were returning to Hingoli, one person namely Santosh had driven the offending vehicle upto Kalamb. When they reached at Kalamb, the deceased was driving the offending vehicle and the applicant was sitting on the seat beside the driver. In the intervening night of 11.5.1991 and 12.5.1991, after crossing village Jambwadi, the offending vehicle dashed against one tree. As per the contention of the applicant, the deceased was driving the offending vehicle in a high and excessive

speed and in a rash and negligent manner which resulted into the unfortunate accident. Due to the dash against the tree, the deceased died on the spot and the applicant has sustained grievous injuries. Due to the dash, the applicant's both legs were pressed under the driver seat. Regarding the said accident, Crime No.43/1991 was registered at Ladkhed Police Station.

3. It is further contention of the applicant that in the alleged accident he sustained grievous injuries and initially he was admitted in the hospital of Dr.Phadke at Yavatmal and, thereafter, he was treated at Medical College and Hospital at Nagpur. In the said accident, his right leg was amputated below the knee as well as he sustained the fracture injuries which resulted into 70% of permanent disability. As the said accident took place due to the rash and negligent driving of the deceased, who was driving the offending vehicle owned by non-applicant No.1 and validly insured with the insurance company (non-applicant No.2), he has claimed the compensation from both the non-applicants.

4. In response to the notice, though the non-applicant No.1 was served, he failed to appear before learned Member of the Tribunal.

5. The non-applicant No.2 resisted the claim petition by filing written statement vide Exhibit-24. The non-applicant No.2 has denied all contentions of the applicant. As per the contention of the non-applicant No.2, from the record and documents it is clear that the applicant himself was driving the offending vehicle and the deceased was sitting beside the driver. The applicant was not employee as driver of the offending vehicle. As the applicant was not holding a valid driving licence, the deceased was shown as driver of the offending vehicle. Thus, contributory negligence of the applicant is responsible for the said accident. It is further contention of the non-applicant No.2 that in view of the policy, the non-applicant No.2 has limited liability and prayed for dismissal of the claim petition.

6. To substantiate the said contention of the non-applicant No.2, the applicant adduced his evidence vide Exhibit-42 and narrated about the alleged incident.

7. Besides the evidence of the applicant, no other evidence is adduced.

8. On behalf of the non-applicant No.2, Dipak Keshavrao Peshwe, Administrative Officer of the insurance company, was examined vide Exhibit-63.

9. Besides the oral evidence, the applicant has placed reliance on the First Information Report Exhibit-45, spot panchanama Exhibit-46, accident report Exhibit-47, injury certificate Exhibits-48 to 50, the insurance policy Exhibit-51, and disability certificate Exhibit-43.

10. Learned Member of the Tribunal, after appreciating the evidence on record, awarded the compensation to the applicant Rs.3,40,768/- along with interest @ 9% from the date of the petition.

11. Being aggrieved and dissatisfied with the impugned judgment and award, the present appeal is preferred on the ground that leaned Member of the Tribunal has erroneously awarded the compensation though the non-applicant No.2 has limited liability in view of the policy. The

award is further challenged on the ground that learned Member of the Tribunal erroneously held that the applicant is third-party being driver of the offending vehicle which met with an accident.

12. Heard learned counsel Shri B.Lahiri for the insurance company and learned counsel Shri K.S.Narwade for respondent No.1/the applicant.

13. Learned counsel Shri B.Lahiri for the appellant/insurance company vehemently submitted that the applicant has not come with clean hands before the Court to claim the compensation. The inquest panchanama, the spot panchanama, and the evidence of the applicant itself show that it was the applicant who was driving the offending vehicle. The alleged accident took place due to the rash and negligent driving by the driver of the offending vehicle. Moreover, liability of the insurance company is limited and, therefore, the insurance company is not liable to pay the compensation.

14. *Per contra*, learned counsel Shri K.S.Narwade the respondent No.1/applicant supported the judgment and award

passed by learned Member of the Tribunal. In addition to the same, he submitted that cross-examination of witness of the insurance company shows that in the insurance policy it is not mentioned that liability of insurance company is limited. He further admitted that regarding the said accident, legal heirs of the deceased have filed a claim petition before the Court at Yavatmal. The said claim was compromised and the compensation was awarded @ Rs.1,30,000/-. He further admitted that since the years 2000-2002 the limitation of the occupant is increased upto Rs.2.00 lacs. He further stated that for issuing policy of motor vehicle, it is necessary to cover risk of driver. He specifically admitted that as per the documents, the deceased was driving the offending vehicle who died in the accident. Learned counsel further submitted that thus the witness of the insurance company himself has admitted that there was no limited liability and the alleged accident has occurred due to negligence of the driver of the offending vehicle who died in the accident and, therefore, the appeal has no merits and the same is liable to be dismissed.

15. Heard rival submissions of parties. I have scrutinized the record with able assistance of learned counsel for both parties.

16. Following point arises for my determination is:

> Whether learned Member of the Tribunal has committed an error holding the insurance company liable to pay compensation?.

17. It is not in dispute that the alleged accident took place on 11.5.1991 when the applicant was travelling in the offending vehicle along with the deceased and one Santosh. The deceased died in the accident. As per the evidence of the applicant, he was called by the non-applicant No.1 to drive the vehicle on 11.5.1991. He took the brother of the non-applicant No.1 at Nagpur. When they were returning from Nagpur, the offending vehicle was driven till Kalamb by one Santosh and, thereafter, the deceased was driving the said offending vehicle in a rash and negligent manner and dashed against one tree. In the said accident, the deceased died on the spot and the applicant has sustained the injuries. Admittedly, the insurance company has not denied that the applicant has sustained the injuries which are grievous in

nature and resulted into permanent disablement. The insurance company has challenged the award only on the ground that the observation of learned Member of the Tribunal, that the applicant is third-party and entitled for compensation, is erroneous. The insurance company further challenged the evidence that at the time of the accident the deceased was driving the vehicle.

18. Learned counsel Shri B.Lahiri for the insurance company submitted that as the deceased was holding a valid driving licence and the applicant was not holding a valid driving licence, the deceased was shown to be driver of the offending vehicle. He further submitted that the applicant intentionally has not filed the copy of inquest report which sufficiently shows that it was the applicant who was driving the offending vehicle. He invited my attention towards the police papers, First Information Report Exhibit-45 and spot panchanama Exhibit-46.

19. Perusal of First Information Report Exhibit-45 shows that the police have received information about the accident and visited the spot of the incident. They found that

the offending vehicle was lying in ditch after dash against the tree. One person is found in a dead condition pressed inside the offending vehicle. The Eastern part of the vehicle is completely damaged and the deceased was found in the Eastern part of the vehicle pressed by the front portion of the offending vehicle. The spot panchanama also shows that the dead person was found on the seat beside the driver seat and other injured are already taken to hospital. The First Information Report of the said incident was lodged at about 10:30 on 12.5.1991. Whereas, the alleged spot panchanama was drawn at about 11:30 to 12:00 pm. Thus, it is clear that the spot panchanama was drawn after the injured persons were shifted to the hospital. Admittedly, no eyewitness is revealed from the report lodged by the police who had witnessed the incident. The spot panchanama was drawn after the injured persons were shifted to the hospital. Thus, the sitting position of the injured has not come on record during the evidence. The possibility that the person who was found pressed by the front portion of the offending vehicle at the Eastern part of the offending vehicle has been removed, and was put on the seat beside the driver seat cannot be

ruled out. Perusal of the First Information Report clearly shows that the person, who was found dead, was found on the front seat of the offending vehicle towards the Eastern portion of the offending vehicle. Learned counsel Shri B.Lahiri for the insurance company vehemently submitted that the applicant was driving the offending vehicle, however the applicant has intentionally not produced the inquest report on record.

It is a well settled that when the insurance company comes with a specific defence, burden is on the insurance company to prove the same.

The evidence of the applicant categorically states that one person by name Santosh was also in the offending vehicle who is not examined by the insurance company as he was the best witness to state who was driving the offending vehicle.

Learned Member of the Tribunal came to the conclusion that it was the applicant who was driving the offending vehicle. However, being he was third-party is entitled to receive the compensation.

20. Learned counsel Shri B.Lahiri for the insurance company submitted that the applicant was not a third-party in the offending vehicle. The expression third-party needs to be determined in each case with reference to the terms of the insurance policy.

21. This Court at Aurangabad Bench in the case of United Indian Insurance Company Limited vs. Anubai Gopichand Thakare and others, reported in 2008(1) Mh.L.J. 73 has observed that the expression third-party needs to be determined in each case with reference to the terms of the insurance policy. If risk of a person is covered under the contract of insurance, he/she should be third-party regarding whom insurance cover can be used.

22. The insurance policy is on record at Exhibit-51 which is a private car policy. In view of the terms and conditions of the policy, a person driving holds or had held or has not been disqualified from an effective driving licence with all required endorsement thereon, as per the Motor Vehicles Act and Rules made thereunder for time being to drive the category of the motor vehicle insured hereunder. Thus,

condition of the policy shows that person who is having a valid driving licence is covered under the said policy.

23. Though the insurance company claims that it was the applicant who was driving the offending vehicle at the relevant time of the accident, he was not holding a valid driving licence and, therefore, the deceased was shown as a person who was driving the offending vehicle at the time of the accident. Admittedly, there is no evidence to the extent that at the time of the accident, the applicant was driving the offending vehicle. Even if it is accepted that the applicant was driving the offending vehicle, he was covered under the policy. Though the insurance company raised defence that the applicant was not having a valid driving licence, the insurance company has not adduced any evidence by examining officials from the Regional Transport Office to show that the applicant was not having a valid driving licence and, therefore, the contention of the insurance company that it was the applicant who was not having driving licence at the time of the accident is not sustainable in absence of the evidence.

24. The next submission of learned counsel Shri B.Lahiri for the insurance company is that the insurance company is not liable to pay the compensation as under the insurance policy the insurance company has accepted the limited liability. The insurance company has adduced the evidence of its official who specifically admitted that it is not mentioned in the insurance policy that the liability of the insurance company is limited. He further admitted that connected claim petitions are settled and the insurance company has paid the compensation to legal heirs of the deceased to the extent of Rs.1,30,000/-. This admission is sufficient to show that the insurance company has satisfied the liability which was more than Rs.1.00 lac.

25. Perusal of the insurance policy under the clause of limits of liability shows, as follows :

> (a) limit of the amount of the company's liability under Section II-1(i) in respect of any one accident as per the Motor Vehicles Act;
>
> (b) limit of the amount of the company's liability under Section II-1(ii) in respect of any one claim or series of claim arising out of one event Rs.5000/-, and

(c) the premium received by the insurance company is Rs.3190/-.

26. Nothing is on record to show that the insurance company has accepted the limited liability. Thus, neither the insurance policy nor any other evidence is on record to show that the insurance company has accepted the limited liability and, therefore, the contention of the insurance company that it has accepted the limited liability and, therefore, the insurance company is not liable to pay the compensation, is not acceptable in the light of the fact that the insurance company in connected claims petitions already accepted the liability to pay compensation more than Rs.1.00 lac. The another reason for not accepting the submission is that the insurance policy nowhere shows that the limited liability is covered under the insurance policy. The terms and conditions of the insurance policy under the head of limits of liability cover the limit of the liability in respect of any accident as per the Motor Vehicles Act.

27. In this view of the matter, both grounds raised by the insurance company is not sustainable.

.....16/-

28. Learned Member of the Tribunal has awarded compensation to the applicant to the extent of Rs.3,40,768/-. The quantum of compensation is not challenged by the insurance company. Even if the evidence adduced by the applicant and the reasoning given by learned Member of the Tribunal are considered, learned Member of the Tribunal has taken into consideration notional income of the deceased by accepting the income as Rs.36,000/- per annum. The applicant has sustained the injuries which resulted into 70% disability. The applicant has not adduced the evidence by examining the Medical Officer. Considering the nature of injuries that the right leg of the applicant was amputated below the knee, learned Member of the Tribunal has taken into consideration 50% of the functional disability. The applicant was 40 years at the time of the accident. So, multiplier of 16 is applied and the compensation is awarded towards loss of income as well as Rs.32,768/- under the head of medical expenses, medical treatment and Rs.20,000/- under the head of pains sufferings, and mental shock etc.. Thus, the compensation awarded by learned Member of the Tribunal appears to be just and reasonable.

29. It is a well settled that a man is not compensated for physical injury, he is compensated for the loss which he suffers as a result of that injury. His loss is not in having the stiff parts of the body, it is inability to leave a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned. In calculating the compensation, the object is to award an amount which will put the injured person in the same position had he not sustained the injuries. It is true that money cannot be renewed the physical frame which has been damaged, but the endeavour in awarding the compensation should be the just and reasonable compensation.

30. In view of the above principle of law, learned Member of the Tribunal has awarded the compensation to the applicant.

31. In this view of the matter, as no perversity or illegality is found in the judgment and award impugned in the appeal, the appeal is devoid of merits and the same is liable

to be dismissed. Hence, the appeal is **dismissed** and **disposed** of with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!